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## Antitrust What Impact Will Bush Have?

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During the Clinton Administration, antitrust became front-page news, not just in legal and business journals, but in the daily newspapers. The level of activity was fueled in part by a strong economy. It included a number of high profile initiatives by the federal antitrust agencies—the Justice Department Antitrust Division and the Federal Trade Commission. These included the following:

- The DOJ litigated a monopolization case against Microsoft and the agencies filed such cases against Intel and American Airlines.
- The FTC and DOJ litigated cases against Visa/ MasterCard and Toys “R” Us for limiting competition and excluding competitors.
- Faced with an unprecedented merger wave (valued at \$1.75 trillion last year), both agencies challenged mergers among Staples/Office Depot, Worldcom/Sprint, Lockheed Martin/Northrup Grumman, Northwest Airlines/Continental Airlines, several drug wholesalers, and Heinz/Beechnut. They also secured consent decrees restructuring mergers among Exxon/Mobil, America Online/Time Warner, Bell Atlantic/Nynex, BP Amoco/ Arco and Shell/Texaco.
- The FTC investigated and cleared a major Internet Business-to-Business joint venture, Covisint, formed by DaimlerChrysler, Ford, General Motors, and Renault/ Nissan.
- The Antitrust Division secured guilty pleas for price fixing from major multinational companies, including Archer Daniels Midland, Hoffman LaRoche, and BASF, garnering criminal fines in excess of \$2 billion last year.
- On many of these matters, the agencies developed unprecedented close working relationships with foreign competition authorities (particularly the European Commission) and state attorneys general.
- The agencies also tried to mold antitrust analysis on such issues as intellectual property, competitor collaborations, health care and the role of efficiencies in merger analysis. Through hearings, the FTC explored whether antitrust laws enacted more than a century ago are adequate for a high-tech,

global economy, and how the antitrust laws should apply to novel business practices such as B2B exchanges and slotting allowances.

### **Will Bush's team cause a shift in enforcement?**

These enforcement activities were led by DOJ's Anne Bingaman and Joel I. Klein and the FTC's Robert Pitofsky, all savvy Washington insiders. Many are asking whether the Bush administration will bring a dramatic shift in antitrust policy. Antitrust was not a key campaign issue, so there are few indications of enforcement direction. During the campaign, President Bush was quoted as saying that he "prefers innovation to litigation" and that the antitrust laws should be primarily enforced against price fixing. It is unlikely, however, that these statements reflect detailed consideration or were intended to signal a sea-change in antitrust policy.

### **Antitrust enjoys broad bipartisan support**

Historically, antitrust has enjoyed wide bipartisan support. Until the Reagan administration, Republican presidents (including Eisenhower, Nixon and Ford) vigorously enforced the antitrust laws. The Reagan administration reined in antitrust enforcement after the extraordinary activism of the Carter administration. The agencies relaxed merger enforcement, brought no vertical restraint cases, cut their budgets by 50%, and believed that markets will fix most competitive problems without antitrust enforcement. The vacuum in federal antitrust enforcement was filled by state attorneys general. Under President Bush, the pendulum swung back to the center.

New leadership at the agencies (James Rill at the Antitrust Division and Janet Steiger at the FTC) revitalized antitrust enforcement, re-built agency budgets and morale, coordinated with foreign and state enforcers, and undertook new economic analysis. The Clinton administration enforcement record was built on this Bush administration base.

Today, there is a broad consensus, spanning party lines, the business community and academics, about the important role antitrust laws play in our free market economy. As Henry Hyde, former chairman of the House Judiciary Committee, recently wrote, "Antitrust law sustains free markets and dissipates political pressure for government regulation. For that reason, Republicans, and indeed all citizens, should support it wholeheartedly....Vigorous and intelligent antitrust enforcement is a cornerstone Republican principle." As a result, the agencies have enjoyed bipartisan support in Congress.

There now exists an "antitrust mainstream" that is likely to endure in the new Bush administration, based on the following basic principles:

- The goal of antitrust enforcement is to enhance consumer welfare and allow consumers the widest choice of the best products at the lowest prices.

- Naked price fixing conspiracies merit tough criminal prosecution.
- Economic analysis must play a critical role in antitrust enforcement.
- Antitrust enforcement is particularly important for industries that have not historically relied on competitive forces, largely as a result of regulation, such as utilities, transportation, telecommunications and health care.
- Many recent mergers have been strategic transactions involving direct competitors, firms that have vertical relationships or firms seeking access to new technologies, markets or skills. These transactions have a greater potential for anticompetitive effects than many mergers in previous years, and they must be reviewed carefully. Nonetheless, mergers are generally either efficient or competitively neutral, merger analysis must take efficiencies into account, and big is not necessarily bad.
- Anticompetitive effects are often hard to predict, and misguided enforcement can deter innovation or prevent efficiencies.
- The likely alternative to antitrust enforcement is regulation.
- There is a need for continued or even enhanced coordination with foreign antitrust authorities. Through close working relationships, the FTC and DOJ and their foreign counterparts have achieved some convergence on many issues.

The business community appreciates the role that antitrust enforcement plays in providing a level field for competition. Major corporations recently have appeared as complainants and witnesses in major antitrust matters, such as International Business Machines in the Microsoft case, American Express and Morgan Stanley Dean Witter in the Visa/MasterCard case and Disney in AOL/Time Warner.

As a result, antitrust policy is likely to build on this consensus, and changes will be at the margin rather than at the core.

### **New policy will come from the new leaders**

To a large degree, antitrust policy will be determined by the new leadership at the agencies. However, although there will be changes in personnel that could affect antitrust policy, these changes are likely to be gradual, particularly at the FTC. Career staff at both agencies are likely to remain.

There will be a new head of the Antitrust Division, but probably not for several months. At the FTC, there will be no vacancies until September, when Chairman Pitofsky's term ends. An FTC spokesman has said that Mr. Pitofsky plans to stay on until then, which means that the current 3-2 Democratic majority on the FTC is

likely to continue until September. President Bush could name one of the Republican commissioners (Thomas Leary or Orson Swindle) as chairman. The FTC chairman's position is significant, in part, because he appoints senior staff, including the directors of the Bureaus of Competition, Consumer Protection and Economics. Mr. Leary is a career antitrust lawyer who believes in the value of competition and an understanding of the need for antitrust enforcement in appropriate cases, although he has dissented on some matters since joining the FTC. Mr. Swindle has a business background, and although he has been skeptical of some FTC enforcement efforts, he also has supported enforcement in both antitrust and consumer-protection cases. He has been quoted as saying that the FTC's mission is "to enforce some basic tenets of free and fair competition, as opposed to trying to create new laws and new interpretations." The terms of the two other Democratic commissioners (Sheila Anthony and Mozelle Thompson) will expire in September 2002 and 2003, respectively.

### **Change is more likely at the margin**

At both agencies, the new administration is likely to bring a somewhat different perspective on some issues, particularly in monopolization and exclusion cases and in some aspects of merger analysis. After a 12-year drought, the Clinton administration pursued several monopolization and exclusion cases, including Microsoft, Intel, and Toys "R" Us. One close Bush adviser, Timothy Muris of George Mason University School of Law, has been critical of the Intel and Toys "R" Us cases, and the Bush administration is less likely to test the outer bounds of antitrust law in this area.

### **Four potential changes under a Bush team**

There are at least four potential changes in merger analysis.

- The new administration may be somewhat more skeptical about claiming anticompetitive effects and more willing to accept arguments that markets are "self-correcting," particularly in industries that change quickly, such as high-tech.
- There is likely to be a greater willingness to accept efficiency claims.
- There is likely to be greater skepticism about claimed anticompetitive effects from vertical transactions.
- There may be a greater reluctance to accept "regulatory" decrees that impose conduct-oriented remedies, such as the recent AOL/Time Warner decree.

The result could be that a few mergers that might have been challenged or subjected to consent decrees in the Clinton administration may be cleared without action by the Bush antitrust enforcers.

Many of the early decisions for the Bush administration will be with respect to matters started during the Clinton administration. Some of the cases to watch include:

- Microsoft has now been fully briefed in the U.S. Court of Appeals for the District of Columbia Circuit (although oral argument is not scheduled until late February), so it will be difficult to change direction dramatically. Change is more likely after a decision by the D.C. Circuit, when the losing side is expected to seek Supreme Court review. The new administration may be more inclined to settle the case, perhaps without the structural relief sought by the Clinton Antitrust Division. But regardless of the views of the new administration, 19 states are involved in the case, and have pledged to continue the lawsuit and to seek a break-up of Microsoft.
- The attempted-monopolization case against American Airlines is scheduled for trial in May.
- The case against Visa/MasterCard is awaiting decision.
- Agency decisions on pending mergers involving United Airlines/US Air and Chevron/Texaco will be made by the Bush administration.

The outcomes in these matters could provide early indications of the likely direction of the new administration.

Antitrust policy over the past eight years was built on a broad consensus from prior Republican and Democratic administrations. This consensus now has bipartisan support, shared to a large degree by both academics and the business community, which recognizes the importance of well-grounded antitrust enforcement in keeping markets open, and sees antitrust as an alternative to regulation. The Clinton administration's antitrust record was built on the foundation laid by the earlier Bush administration and was fueled by the merger wave, deregulation, globalization and the growth in high-tech industries. Many of these trends likely will continue. Although the new administration may not be as aggressive in antitrust cases at the margin, the basic antitrust enforcement trends of the past 12 years are likely to continue.